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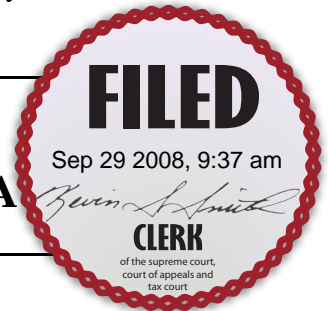
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**IN THE
COURT OF APPEALS OF INDIANA**



ADRIAN E. COFIELD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A05-0801-CR-55

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven J. Rubick, Commissioner
The Honorable Patricia J. Gifford, Judge
Cause No.49G04-0702-FC-26777

September 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Adrian Cofield appeals his convictions of intimidation, a Class C felony, and pointing a firearm at another person, a Class D felony. On appeal, Cofield raises two issues, which we restate as 1) whether the trial court properly excluded two defense witnesses from testifying and 2) whether sufficient evidence supports Cofield's conviction of intimidation. Concluding the trial court did not abuse its discretion when it excluded the two defense witnesses from testifying and that sufficient evidence supports Cofield's intimidation conviction, we affirm.

Facts and Procedural History

On the evening of January 31, 2007, Turkessa Earls left A.C., her five-year-old son, with Cofield (A.C.'s father) for parenting time. When Earls dropped off A.C., she and Cofield did not discuss how long parenting time would last. According to Earls, she wanted Cofield to watch A.C. through the weekend because she "had plans on Saturday." Transcript at 28. Earls's schedule apparently conflicted with Cofield's, as he made repeated telephone calls to her over the next several days asking when she was going to pick up A.C. Earls did not answer most of these calls, but finally answered one on the morning of February 3, 2007. During that conversation Earls hung up after Cofield told her "to come get this mother fucker because he's pissin [sic] all over my house" Id. at 30.

That evening, Earls went with three friends to pick up A.C. While A.C. was getting his belongings, Earls and Cofield got into an argument that culminated in Cofield pointing a handgun at Earls and stating, "Bitch, you want to see smoke, I'll show you

smoke.” Id. at 40. When Earls and her three friends attempted to drive away with A.C., Cofield jumped in front of their vehicle while brandishing the same handgun. They eventually drove away and called 911 shortly thereafter.

On March 6, 2007, the State charged Cofield with intimidation, a Class C felony, and pointing a firearm at another person, a Class D felony. On October 11, 2007, the trial court presided over a jury trial. During the State’s case-in-chief, Earls and her three friends testified to the events described above. Following a break in one of these witness’s testimony, the State’s assisting witness, Officer Jeff Luster of the Indianapolis Metropolitan Police Department, testified that during the break, he observed Cofield talking to two defense witnesses “about testimony that each one of the [State’s] witnesses had given this afternoon.” Id. at 128-29. Based on Officer Luster’s testimony, the trial court found that Cofield had violated the separation of witnesses order made at the outset of trial and, to remedy the violation, excluded Cofield’s witnesses from testifying. Cofield proceeded with his case-in-chief by testifying on his own behalf, and the jury returned guilty verdicts on both counts. After accepting the jury’s verdicts and entering judgments of conviction, the trial court sentenced Cofield to two years executed. Cofield now appeals.

Discussion and Decision

I. Exclusion of Defense Witnesses

Cofield argues the trial court improperly excluded his witnesses from testifying. “The determination of the remedy for any violation of a separation order is wholly within the discretion of the trial court.” Jordan v. State, 656 N.E.2d 816, 818 (Ind. 1995). A

reviewing court will not reverse the trial court's decision absent a showing that the trial court abused its discretion. Id. "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or where the trial court has misinterpreted the law." Childs v. State, 761 N.E.2d 892, 894 (Ind. Ct. App. 2002).

Cofield argues the trial court abused its discretion when it excluded his witnesses because the State did not present sufficient evidence to support a finding that he violated the separation of witnesses order. Cofield acknowledges Officer Luster testified that he observed Cofield talking to the witnesses "about testimony that each one of the [State's] witnesses had given this afternoon," but claims this evidence is insufficient to support a violation because it was lacking on the specifics of Cofield's conversation with the witnesses. Talking to witnesses who have not yet testified about the testimony of other witnesses is a textbook example of a violation of a separation witnesses order, as it undermines the primary purpose for which such an order is imposed. See Harrington v. State, 584 N.E.2d 558, 562 (Ind. 1992) ("The primary purpose for separation of witnesses is to prevent them from gaining knowledge from the testimony of other witnesses and adjusting their testimony accordingly."). That Officer Luster did not testify regarding the specifics of the conversation does not render his actual testimony insufficient for purposes of determining whether the separation of witnesses order had been violated.

Once a violation of a separation of witnesses order occurs, prejudice to the non-violating party is presumed. Ray v. State, 838 N.E.2d 480, 488 (Ind. Ct. App. 2005), trans. denied. Although the presumption may be overcome if the violating party can

show there was no prejudice, see id., Cofield did not present any evidence, through cross-examination of Officer Luster or otherwise, demonstrating that the State was not prejudiced. Thus, the trial court's decision to exclude Cofield's witnesses as a remedy for violating the separation of witnesses order was not an abuse of discretion.

II. Sufficiency of the Evidence

Cofield argues insufficient evidence supports his intimidation conviction. In reviewing challenges to the sufficiency of the evidence, "appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict." McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). It is the trier of fact's duty to weigh the evidence to determine whether the State has proved each element of the offense beyond a reasonable doubt. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). Accordingly, we "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" McHenry, 820 N.E.2d at 126 (quoting Tobar v. State, 740 N.E.2d 109, 111-12 (Ind. 2000)); see also Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) ("Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence." (quotations, footnote, and citations omitted) (emphasis in original)).

To convict Cofield of intimidation as a Class C felony, the State had to prove beyond a reasonable doubt that while drawing or using a deadly weapon, Cofield communicated a threat to Earls with the intent to place her in fear of retaliation for a prior

lawful act. See Ind. Code §§ 35-45-2-1(a) and (b)(2). Indiana Code section 35-45-2-1(c)(1) defines “threat” to include “an expression, by words or action, of an intention to . . . unlawfully injure the person threatened or another person”

Cofield argues insufficient evidence supports his intimidation conviction because “the [S]tate did not prove beyond a reasonable doubt that Mr. Cofield intended to place [Earls] in fear of retaliation for the [prior lawful] act it had charged,” appellant’s brief at 15, namely, the prior lawful act of “waiting until February 3, 2007, to pick up her son,” appellant’s appendix at 20. To the contrary, one reasonable inference to be drawn from Cofield threatening Earls with a gun is that he engaged in such conduct precisely because Earls waited too long to pick up A.C. The State presented evidence that Cofield repeatedly called Earls in the days preceding February 3, 2007, to ask when she was going to pick up A.C., and, on that morning, specifically told Earls to “to come get this mother fucker because he’s pissin [sic] all over my house” Tr. at 30. When Earls arrived that evening, she and Cofield got into an argument that culminated in Cofield pointing a handgun at Earls and stating, “Bitch, you want to see smoke, I’ll show you smoke.” Id. at 40. The jury could have reasonably inferred that this threat was in retaliation for Earls’s prior lawful act of waiting until February 3, 2007, to pick up A.C. Thus, it follows that sufficient evidence supports Cofield’s intimidation conviction.

Conclusion

The trial court properly excluded Cofield’s witnesses as a remedy for Cofield’s violation of the separation of witnesses order. Moreover, sufficient evidence supports Cofield’s conviction of intimidation.

Affirmed.

NAJAM, J., and MAY, J., concur.